90-1161

FILED
DEC 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.: _____

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1990

THOMAS D. SIKES

Petitioner/Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent/Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALVIN E. ENTIN, ESQ.
2450 N.E. Miami Gardens Drive
Second Floor
Miami, Florida 33180
(305) 932-0550

Counsel for the Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Eleventh Circuit Court of Appeals affirming the district court's allowing the introduction at trial of evidence of criminal behavior on the part of the Petitioner for which he had received transactional immunity is in direct conflict with Kastigar v. United States, 406 U.S. 441, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972), Brown v. Walker, 161 U.S. 591, 40 L.Ed. 819, 16 S.Ct. 644 (1896), and Murphy v. Waterfront Commission, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964).

2. Whether the decision of the Eleventh Circuit Court of Appeals affirming the district court's allowing the introduction at trial of evidence of criminal behavior on the part of the Petitioner for which he had received transactional immunity is in direct

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Eleventh Circuit Court of Appeals affirming the district court's allowing the introduction at trial of evidence of criminal behavior on the part of the petitioner for which he had received transactional immunity is in direct conflict with Kastigar v. United States, 406 U.S. 441, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972), Brown v. Walker, 161 U.S. 591, 40 L.Ed. 819, 16 S.Ct. 644 (1896), and Murphy v. Waterfront Commission, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964).

2. Whether the decision of the Eleventh Circuit Court of Appeals affirming the district court's allowing the introduction at trial of evidence of criminal behavior on the part of the petitioner for which he had received transactional immunity is in direct

conflict with Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1970),

conflict with Santobello v. New
York, 404 U.S. 257, 92 S.Ct. 495, 30
L.Ed.2d 427 (1970).

LIST OF INTERESTED PARTIES

TRIAL JUDGE	**Kenneth L. Ryskamp**
PETITIONER	**Thomas D. Sikes**
UNITED STATES OF AMERICA	**Eileen O'Connor Assistant United States Attorney**
ATTORNEY FOR PETITIONER	**Alvin E. Entin, Esq.**
ALLEGED VICTIMS	**None**

court's allowing the introduction at trial of evidence of criminal behavior on the part of the Petitioner for which he had received transactional immunity is in direct conflict with Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1970).

Conclusion..... 26

Proof of Service..... 25

TABLE OF CONTENTS

Page

Opinions Below..... 2

Jurisdiction..... 2

Constitutional Provisions, Statutes, and Regulations Involved..... 3

Statement of the Case..... 6

(i) Course of Proceedings and Disposition Below

(ii) Statement of Facts

Reasons for Granting the Writ..... 16

(i) Whether the decision of the Eleventh Circuit Court of Appeals affirming the district court's allowing the introduction at trial of evidence of criminal behavior on the part of the Petitioner for which he had received transactional immunity is in direct conflict with Kastigar v. United States, 406 U.S. 441, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972), Brown v. Walker, 161 U.S. 591, 40 L.Ed. 819, 16 S.Ct. 644 (1896), and Murphy v. Waterfront Commission, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964).

(ii) Whether the decision of the Eleventh Circuit Court of Appeals affirming the district

court's allowing the introduction at trial of evidence of criminal behavior on the part of the Petitioner for which he had received transactional immunity is in direct conflict with Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1970).

Conclusion..... 26

Proof of Service..... 26

TABLE OF AUTHORITIES

Cases	Page
Brown v. Walker, 161 U.S. 591 40 L.Ed. 819, 16 S.Ct. 644 (1896)	17, 19
Counselman v. Hitchcock, 142 U.S. 547, 35 L.Ed. 1110 12 S.Ct. 195 (1892)	17-18
Dunn v. United States 307 F.2d 883 (5th Cir.1962)	21
Kastigar v. United States 406 U.S. 441, 32 L.Ed.2d 212 92 S.Ct. 1653 (1972)	16, 18 22
Murphy v. Waterfront Commission 378 U.S. 52, 84 S.Ct. 1594 12 L.Ed.2d 678 (1964)	23
Rowe v. Griffin 676 F.2d 524 (11th Cir.1982)	20
Santobello v. New York 404 U.S. 257, 92 S.Ct. 495 30 L.Ed.2d 427 (1970)	23-25
United States v. Garza 608 F.2d 659 (5th Cir.1979)	20-21

TABLE OF CONTENTS

Page

Opinions Below..... 1

Jurisdiction..... 2

Constitutional Provisions, Statutes, and Regulations Involved..... 3

Statement of the Case..... 4

(i) Course of Proceedings and Disposition Below

(ii) Statement of Facts

Reasons for Granting the Writ..... 16

(i) Whether the decision of the Eleventh Circuit Court of Appeals affirming the district court's allowing the introduction at trial of evidence of criminal behavior on the part of the Petitioner for which he had received transactional immunity is in direct conflict with Kastigar v. United States, 406 U.S. 441, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972), Brown v. Walker, 161 U.S. 591, 40 L.Ed. 819, 16 S.Ct. 644 (1896), and Murphy v. Waterfront Commission, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964).

(ii) Whether the decision of the Eleventh Circuit Court of Appeals affirming the district

CASE NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THOMAS D. SIKES

Petitioner/Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent/Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH JUDICIAL CIRCUIT

The Petitioner, THOMAS D. SIKES, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

CASE NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

THOMAS D. SIKES

Petitioner/Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent/Appellee

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH JUDICIAL CIRCUIT

The Petitioner, THOMAS D. SIKES, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Judgment of the District Court is reprinted herein. (App. 1-5). The district court's ruling on the Petitioner's Sealed Motion to Dismiss, and its Findings of Fact and Conclusions of Law were made orally. The opinion of the Court of Appeals for the Eleventh Circuit affirming the Judgment of the District Court in United States v. Weaver, 905 F.2d 1466 (11th Cir.1990), was rendered on July 13, 1990, and is reprinted herein. (App. 5-42). The Order denying Petitioner's timely-filed Petition for Rehearing was rendered by the Court on September 6, 1990, and is reprinted herein. (App. 42-43). The Mandate issued on September 17, 1990, with the Opinion.

JURISDICTION

This petition arose in the first instance from criminal charges filed in the District Court for the Southern

District of Florida. The Judgment in a Criminal Case rendered by the Court (App. 1-5) was appealed to the United States Court of Appeals for the Eleventh Circuit pursuant to the jurisdiction vested in the Court by 28 U.S.C. 1291.

This court has jurisdiction over this petition pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States, Amendment V

No person shall be shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

district of Florida. The judgment in a criminal case rendered by the court (App. 1-3) was appealed to the United States Court of Appeals for the Eleventh Circuit pursuant to the jurisdiction vested in the court by 28 U.S.C. 1291.

This court has jurisdiction over this petition pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS,
STATUTES, AND RULES INVOLVED

Constitution of the United States, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 8. Joinder of Offenses and of Defendants.

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series

himself, nor be deprived of life, liberty,
or property, without due process of law;
nor shall private property be taken for
public use, without just compensation.
Rule 8. Joinder of Offenses and of
Defendants.

(a) Joinder of Offenses. Two or more
offenses may be charged in the same
indictment or information in a separate
count for each offense if the offenses
charged, whether felonies or misdemeanors
or both, are of the same or similar
character or based on the same act or
transaction or on two or more acts or
transactions connected together or
constituting parts of a common scheme or
plan.

(b) Joinder of Defendants. Two or more
defendants may be charged in the same
indictment or information if they are
alleged to have participated in the same
act or transaction or in the same series

of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

of acts or transactions constituting an offense or offenses. Each defendant may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

STATEMENT OF THE CASE

On April 9th, 1987, the Petitioner, THOMAS SIKES, through counsel, contacted Mike Devlin, a Special Agent of the United States Drug Enforcement Administration, to negotiate a cooperation agreement. Discussions were initiated regarding an immunity agreement for SIKES. Devlin recalled that the years the immunity agreement was to cover were 1981-1985, but he testified that at the time of that discussion, the inclusion of the year 1986 in the immunity agreement would have made no difference.[1]

Fred Schwartz, the attorney who initiated the contact with the D.E.A. regarding the immunity agreement, testified that the Petitioner's sole purpose in initiating the negotiations with D.E.A. was to acquire an "immunity

---

[1] A.U.S.A. Karadbil had the same impression.

bath" for all of his prior criminal activities. In other words, the sole motivation for SIKES was to avoid indictment for any of his past criminal activities.

Alvin E. Entin also represented SIKES. He negotiated the immunity agreement and testified at the hearing on SIKES' Motion to Dismiss the indictment that SIKES' responsibilities were to furnish the government with information, and to introduce the agents to smugglers. The District Court found that the Petitioner performed his obligations under the agreement. The government did not appeal this finding.

Entin testified that it was understood by the government that SIKES was trying to avoid prosecution for any and all prior activities.

In his first conversation with Assistant U.S. Attorney Neil Karadbil,

Entin remembered mentioning immunity for illegal activities occurring over a six-year period. He drafted a letter to cover the period from 1981 through 1986 which reflected his oral understanding with Karadbil.[2] However, Entin mistakenly inserted the year 1985 instead of 1986 as the last year to be covered by the agreement.

After Karadbil sent back a signed copy of the letter agreement, Entin sent it to SIKES. SIKES called him immediately (on May 13) to point out the error in the date. Entin sent a corrective letter to Karadbil on May 14th, but received no response, and no indication that any problem of any nature existed until he received Karadbil's June 2nd letter.

SIKES testified at the motion

---

[2] Although Entin and Karadbil had primarily discussed the years 1985 and 1986, Entin extended the agreement back to 1981, because "nobody really cared" about the years to be covered.

hearing, that the only drug transactions that he was concerned about occurred in 1985 and 1986. He did not engage in any drug deals in 1981-1984.

On May 12, Special Agent Devlin was called into the office of his superior, Pat Shea, and told that Mr. SIKES was the target of a federal investigation in Ft. Lauderdale, Florida.[3] However, Shea did not tell Devlin to terminate the cooperation SIKES was giving, or to cease using SIKES as an informant. In fact, Shea told Devlin to proceed with the operation, even though he was aware that the revelation of the investigation with SIKES might affect the agreement. Nor did Devlin tell SIKES that he was the subject of an investigation.

On May 29th a meeting was held as the result of a prior meeting on May 21, which

---

[3] A.U.S.A. Neil Karadbil was also informed of the problem on May 12.

was attended by Devlin, Shea, Agents Benisek, Bob Mangiamele, and Paul Teresi,[4] and Eileen O'Connor, the prosecutor in the instant case. At the meeting, it was agreed that they would not use SIKES again, and that he would be debriefed one more time, in order to obtain more particular information about SIKES' smuggling activities during 1981-1985. Devlin and the other Miami-based agents were instructed not to debrief SIKES for activities occurring in the year 1986, but he was extensively interviewed regarding criminal activities in 1985. Furthermore, SIKES specifically referred to a 450 kilogram cocaine deal in February, 1986, and a 500 kilogram cocaine deal in July or August of 1986.

On September 23, 1987, a federal grand jury sitting in the Southern

---

[4] The head of the Ft. Lauderdale D.E.A. Office.

District of Florida returned a twenty-nine (29) count indictment against the Petitioner, THOMAS D. SIKES, and twenty (20) other individuals. SIKES was charged with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count I), conspiracy to import cocaine, in violation of 21 U.S.C. 963 (Count II), conspiracy to possess approximately two hundred and fifty (250) kilograms of cocaine with intent to distribute, in violation of 21 U.S.C. 846 (Count III), importation of approximately two hundred and fifty (250) kilograms of cocaine, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2 (Count XII), possession with intent to distribute approximately two hundred fifty (250) kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count XIII), importation of three hundred (300) kilograms of cocaine, in violation of 21 U.S.C. 952(a) and 18

U.S.C. 2 (Count XIV), possession with intent to distribute approximately three hundred (300) kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count XV), importation of three hundred fifty (350) kilograms of cocaine, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2 (Count XVI), possession with intent to distribute approximately three hundred fifty (350) kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count XVII), importation of three hundred twenty (320) kilograms of cocaine, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2 (Count XX), possession with intent to distribute approximately three hundred twenty (320) kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count XXI), and distribution of at least one (1) kilogram of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count XXVI).

In a clear violation of the Petitioner's agreement with the government, the indictment encompassed crimes allegedly occurring in 1985, and for which the Petitioner had been granted transactional immunity, as well as those allegedly occurring in 1986. Thus, the government had presented testimony to the grand jury regarding the offenses for which SIKES had been immunized.

On December 29, 1987, SIKES filed a Sealed Motion to Dismiss Based upon Specific Performance of an Agreement. The Motion alleged that, pursuant to a cooperation agreement with the government, the Petitioner was not amenable to prosecution for certain of the Counts contained in the indictment.

The Court heard testimony on the motion for three days. Ultimately, the Court's ruling was that there was a valid agreement between the United States and

THOMAS SIKES, that if the Entin letter had said 1986 instead of 1985, Karadbil would probably have signed it, the agreement conferred immunity only for the years covered in the original letter agreement, 1981-1985, and finally, that SIKES' performance under the agreement was satisfactory.

SIKES was declared to be immune from prosecution for criminal acts committed in the years 1981 through 1985. Because other defendants were charged with offenses occurring in 1985 which allegedly involved SIKES, counsel for SIKES asked for a severance of those counts from the indictment. The Court denied the motion.

On June 13, 1988, a jury was empaneled and trial commenced. During the trial, the Court granted a severance as to the counts of the indictment involving the importation of marijuana in 1985. Prior to the severance, however, massive amounts

of testimony were introduced regarding the 1985 offenses, and SIKES was identified on numerous occasions as having been involved in these offenses.

On July 29, 1988, the jury returned a partial verdict, finding SIKES guilty on counts II and III of the indictment. On October 18, 1988 the Court sentenced SIKES to serve a term of thirty-six (36) years incarceration on counts II and III, to be served consecutively to his prior sentence (on 82-73-CR-SMA), a fine of one million ($1,000,000.00) dollars, and an assessment of one hundred ($100.00) dollars.

The Petitioner timely-filed his Notice of Appeal on October 21, 1988. The opinion of the Court of Appeals for the Eleventh Circuit affirming the Judgment of the District Court in United States v. Weaver, 905 F.2d 1466 (11th Cir.1990), was rendered on July 13, 1990. (App. 5-42). The Order denying Petitioner's timely-

filed Petition for Rehearing was rendered by the Court on September 6, 1990. (App. 42-43). The Mandate issued on September 17, 1990, with the Opinion.

REASONS FOR GRANTING THE WRIT

(i) There are basically two kinds of immunity: transactional and use. Use immunity is a creature of statute. Under Title 18 U.S.C. § 6001 et seq. when a person is compelled to testify and is granted "use" immunity nothing he says, nor any investigative leads derived therefrom may be used against him directly or indirectly. Kastigar v. United States, 406 U.S. 441, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972).

Transactional immunity is considerably broader than use immunity. It is immunity from criminal prosecution for or on account of any transaction, matter, or thing involving a Defendant for which immunity was granted. In the

instant case the Defendant was granted transactional immunity. This grant should have protected SIKES from any direct or indirect liability for any act for which he was immunized in 1985. Nevertheless, the immunity afforded to the Petitioner in the instant case was significantly narrower than that contemplated in by this Court in Brown v. Walker, 161 U.S. 591, 40 L.Ed. 819, 16 S. Ct. 644 (1896). In Brown, the Court stated (161 U.S. at 597):

> Stringent as the general rule is, however, certain classes of cases have always been treated as not falling within the reason of the rule, and, therefore, constituting apparent exceptions. When examined, these cases will all be found to be based upon the idea that, if the testimony sought cannot possible be used as a basis for, or in aid of, a criminal prosecution against the witness, the rule ceases to apply . . . . [Emphasis supplied].

The full extent of the protection afforded under transactional immunity is discussed in Counselman v. Hitchcock, 142 U.S. 547, 35 L.Ed. 1110, 12 S.Ct. 195

(1892) wherein the Court said that a grant of immunity to be valid had to afford absolute protection against future prosecution for the offense to which the question related. It was felt that much of this broad protection would be abrogated by a use immunity statute.

In fact, the National Commission on Reform of Federal Laws pointed out in its Working Papers, 1405-1444 (1970)[5] that:

> We are satisfied that our substitution of immunity from use for immunity from prosecution meets constitutional requirements for overcoming the claim of privilege. Immunity from use is the only consequence flowing from a violation of an individual's constitutional right to be protected from unreasonable searches and seizures, his constitutional right to counsel, and his constitutional right not to be coerced into confessing....

Thus where transactional immunity is conferred it encompasses a broader degree of immunity than mere use immunity.

---

[5] As cited in Kastigar, supra. at 32 L.Ed.2d 212, 221, n.36.

Indeed, as this Court stated in Kastigar, 32 L.Ed.2d at 222:

> While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege.

In the instant case the government was permitted to use the 1985 evidence to convict the Defendant of two counts of the indictment which initially included acts during the year 1985. Although the language in the indictment relating to 1985 was redacted as to SIKES, it was painfully obvious that the criminal acts which occurred in 1985, and upon which the jury heard extensive testimony, involved SIKES. Certainly this is in conflict with the clear language of Brown v. Walker, supra., as cited above.

Despite the false palliative of curative instructions, the harm done to

the Petitioner's defense was manifest. The counts which involved the 1985 acts were the only counts in the Indictment upon which the jury found the Defendant guilty. Having been granted immunity the Defendant is thus entitled to the full benefit of his bargain. Rowe v. Griffin, 676 F.2d 524 (11th Cir.1982). SIKES was denied the benefit of his bargain by being prosecuted with evidence relating to 1985.

Although, as noted above, the Court gave "curative" instructions in regard to the testimony and exhibits, its adequacy is clearly insufficient in that the indirect corroborative usage of the evidence clearly worked to the detriment of the Defendant. In fact, the instructions regarding the prejudicial testimony served only to repeatedly focus the jury's attention on it. Some testimony is simply not amenable to cure by instruction from the Court. United

States v. Garza, 608 F.2d 659 (5th Cir.1979). As the Court stated in Dunn v. United States, 307 F.2d 883, 886 (5th Cir.1962):

> Otherwise stated, one "cannot unring a bell"; "after the thrust of the saber it is difficult to say forget the wound"; and finally, "if you throw a skunk into a jury box, you can't instruct the jury not to smell it."

It is obvious that having failed to sever SIKES from the other defendants when originally requested to do so, the Court, pursuant to Rule 14 of the Federal Rules of Criminal Procedure, should have severed SIKES out of the trial, and tried him separately. Only by that action could the Court have protected the Defendant from the massive spillover of the evidence relating to the 1985 cocaine transactions, and preserved the integrity of the immunity agreement.

In addition, although the Court ultimately severed the marijuana counts from the trial, the admission of days of

testimony regarding them further prejudiced the Defendant.

The ruling of the Court upholding the transactional immunity agreement between the government and SIKES compelled the Rule 14 severance of SIKES from the trial as soon as it became apparent that the government would be relying on evidence regarding criminal activities on his part which occurred prior to 1986. The usage of this evidence was certainly "in aid of" a criminal prosecution.

(ii) Under Kastigar and its progeny it is the government's burden to protect the immunized defendant from violations of the immunity agreement. In the instant case the Government made no such effort. The case law is clear that immunized evidence may not be used in any manner by federal officials in connection with a criminal prosecution, even if the immunized evidence is given in a State proceeding.

Murphy v. Waterfront Commission, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964).

But a second line of cases rendered by this Court act to protect the Petitioner. In Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1970), the seminal case involving the broken promises of the government, this Court stated:

> ... when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Santobello was indicted on two State felony counts under New York statutes. After negotiating a plea through his attorney, he withdrew his not guilty plea, and entered a guilty plea to a lesser charge. The prosecution agreed to make no recommendation as to the sentence to be imposed.

At the sentencing, a prosecutor who had not been involved in the plea

negotiations appeared, and recommended the maximum sentence. Despite the objections of Santobello's attorney, the Court sentenced Santobello to the maximum sentence. Even though the trial court judge announced that he was not influenced by the prosecutor's recommendation, and was influenced solely by the probation report, the United States Supreme Court reversed.

The Court went on to rule that the fact that the breach was inadvertent was "immaterial." The inadvertence did not lessen the impact of the breach. Nor would the fact that the Court did not rely on the prosecutor's recommendation stave off a remand to the state court for further consideration. id.

In the instant case, the breach of the agreement was clear, material, and deliberate. The government tried four different methods to prejudice the

Petitioner with the evidence relating to 1985. First, it presented the evidence to the grand jury; second, it included counts in the indictment which dealt solely with SIKES' activities in 1985; third, it joined 1985 and 1986 activities in the conspiracy counts; fourth, it denied that SIKES had complied with the immunity agreement; and fifth, after the district court upheld the validity of the agreement as to 1985, and ruled that SIKES had fully complied, it introduced evidence regarding criminal episodes for which SIKES had been given transactional immunity into the trial of the 1986 offenses.

It simply cannot be maintained in good faith that this behavior on the part of the government complied with the letter or the spirit of the agreement. It was a clear breach under Santobello, and the affirmance of its admission by the Eleventh Circuit directly conflicts with

that case.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

ALVIN E. ENTIN, ESQUIRE
Entin, Schwartz, Goldman,
Margules & Moore
2450 N.E. Miami Gardens Drive
Second Floor
Miami, Florida 33180
(305) 932-0550

PROOF OF SERVICE

COMES NOW, Alvin E. Entin, Esq., on behalf of the Petitioner, THOMAS SIKES, and states to this Court:

1) That on December , 1990, the attached Writ of Certiorari submitted on behalf of the Petitioner was mailed at the United States Post Office, Miami, Florida.

2) I certify that a true and accurate copy of the foregoing Petition for Writ of

Certiorari has been furnished to Kenneth W. Starr, Solicitor General of the United States, 10th and Constitution, N.W., Washington, D.C. 20530.

3) Said statement is being submitted to this Court pursuant to Rule 28.2 of the Rules of the Supreme Court.

ALVIN E. ENTIN, ESQUIRE
Entin, Schwartz, Goldman
Margules & Moore
2450 N.E. Miami Gardens Drive
Second Floor
Miami, Florida 33180
(305) 932-0550

SWORN TO AND SUBSCRIBED before me this ____ day of December , 1990.

NOTARY PUBLIC, STATE OF FLORIDA

My commission expires: